

Disciplinary and Harassment Investigations: Who, What, When and How

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Presented By: Alison R. Kalinski



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When to Investigate



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When to Investigate

- Suspected rule violations
- Reasonable suspicion of employee misconduct
- Alleged or suspected harassment or discrimination



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Reasonable Suspicion Is

- Based on “specific and articulable” facts
- Reasonable person believes a violation occurred



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Duty to Investigate Harassment Complaints

Under Federal and State Law:

- Affirmative obligation to promptly investigate harassment complaints

Not only this but...



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Harassment Investigations

- Take corrective action to prevent harassment
- Impose appropriate discipline



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What to Investigate



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Discrimination and Harassment Investigations

What to look for:

1. Protected status
2. Physical, verbal, or visual behavior
3. Objectively and subjectively offensive
4. Alters working conditions making it more difficult to do the job



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Hostile Work Environment

PROTECTED STATUS:

- Sex or gender
- Race or color
- National origin or ancestry
- Sexual orientation
- Religion
- Military and veteran status
- Genetic information
- Age (over 40)
- Disability/medical condition
- Marital status
- Gender identity and expression
- Opposition to harassment
- Transgender
- Reproductive health decision-making



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A Few Examples...

- Race or color
 - Racially derogatory statements
 - Jokes about race



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A Few More Examples...

- Sex or gender
 - Listening to provocative talk shows at work
 - Touching intimate body parts
 - Sexual comments
 - Bullying behavior towards one gender



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Case Study #1 – Facts

The Financial Aid Director introduces three newly hired staff members to the department: Alicia, Becky, and Christopher. The director closes the introductions by noting that Alicia worked in financial aid at another district. The director then notes that Becky and Christopher have IT backgrounds.



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Case Study #1 – Facts

One week later, Christopher, who is transgender, comes to you and complains that he is being subjected to a “hostile work environment.” He mentions the problems started the first day on the job when, after the director introduced him to everyone, he saw several staff members start to snicker and whisper to one another.



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Case Study #1 – Questions

Christopher wants to lodge a formal complaint against the people harassing him and insists that the District investigate.

Do you have enough to launch a formal investigation?

What additional information, if any, would be helpful in evaluating Christopher's complaint?

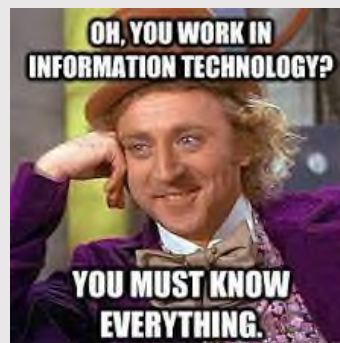


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Case Study #1 – More Facts

When asked to describe the harassment, Christopher explains that one day, someone plastered his car with printouts of memes making fun of IT workers. Christopher explains he is deeply offended by the conduct.



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Case Study #1 – Questions

Based on this additional information, does this appear to be a complaint regarding unlawful harassment?

Is the district required to investigate this matter under State or Federal law?



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Case Study #1 – More Facts

Christopher explains similar things have been happening to Alicia, who is also transgender, although the printouts taped on her car are FAFSA-related memes. Nothing has happened to Becky, who is cisgender, even though the director pointed out that she has an IT background, like Christopher. You confirm with Alicia and Becky that this is the case.

Now should you investigate?



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Discipline Investigations

- When you suspect an employee has violated a work rule
- When you suspect an employee has engaged in misconduct



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When to Investigate

- Promptly
 - Preliminary considerations
 - Complaint
 - Observations
 - Rumor
- *Complaints governed by Title 5 of the California Code of Regulations must be investigated within specific timelines.



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Case Study #2 - Facts

Linda works in the library. In November, when Linda reported to work, her supervisor, Max, observed Linda had bloodshot eyes and slurred speech. Max also observed Linda walking unsteadily, and bumping into the shelving, knocking books over. Believing Linda to be under the influence of drugs or alcohol, Max sent her home.



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Case Study #2 – More Facts

Max reported the incident to the HR Director. The Director, also assuming Linda to be under the influence of drugs or alcohol, sent a letter to Linda's home informing her of the district's Employee Assistance Program for employees with drug or alcohol problems. The HR Director also advised that Linda could be granted time off to participate in rehabilitation programs.



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Case Study #2 - Questions

Was Max correct in sending Linda home?

What, if anything, would you do differently?



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Case Study #2 – More Facts

In December, Linda arrives to work and she is again stumbling. As she enters the library, she stumbles then falls directly into and destroys the recently installed holiday display. She then runs off to clock in, leaving the mess on the floor. Sheila, a campus security guard, watched the entire incident. When Max arrives 10 minutes later, Sheila informs him of what she saw.



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Case Study #2 - Questions

What do you do next?

Should you investigate?



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Who Investigates



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Who Investigates

- You
- Other internal personnel
- Outside investigator
- Attorney



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Selecting the Investigator

- Experience
- Training
- Neutrality vs. bias
- Time commitment
- Status of investigator
- Threat of litigation



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Considering an Outside Investigator

- Specialized skill or knowledge
- Efficiency
- Surveillance
- Safety
- Time
- Scope of the investigation
 - Strictly fact-finding
 - Fact-finding and determinations



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Attorney as Investigator

- Pros:
 - Experienced in conducting interviews
 - Knowledge of employment law
- Cons:
 - Attorney-client privilege may not apply
 - Cannot assist with discipline
- Consider using legal counsel to advise investigator



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How to Investigate



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How to Investigate

- Golden rules
- Game plan
- Interim steps
- Fact gathering and assessment
- Report preparation
- Closure



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How to Investigate

Golden Rules

- Be prepared
- Stay focused on your objective
- Stay organized
- Maintain confidentiality, to extent possible
- Follow the rules



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How to Investigate Step 1: Develop a Game Plan

- Identify objective
- Determine scope of investigation:
 - Gravity of offense
 - Limited resources
 - Employee morale
 - Communicate parameters to investigator
- Be aware of procedural requirements
 - Review rules, policies, procedures, CBAs
 - Title 5 requirements (if applicable)
 - Provide appropriate due process



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How to Investigate Step 1: Develop a Game Plan

Interim steps for students may include:

- Administrative leave
- Transfer
- Alter schedule
- Escort
- Academic assistance
- No retaliation
- Fair and consistent treatment



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How to Investigate Step 2: Create an Investigation Binder

- Label CONFIDENTIAL
- Include sections for:
 - Complaint/alleged violations
 - Rules and regulations
 - Documentary evidence
 - Witness list
 - Interview notes
 - Written report
 - Findings/conclusions



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How to Investigate Step 3: Gather Relevant Evidence

- Personnel files
- E-mails, memos, disciplinary documents
- Physical evidence



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How to Investigate Step 3: Gather Relevant Evidence

- Administrative searches
 - Reasonable expectation of privacy
 - Review personnel rules



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Case Study #3 – Facts

You have received a complaint from an administrative assistant, Kenny, that his immediate supervisor, payroll manager Barbara, frequently browses inappropriate content on her office computer. Kenny also reported seeing several tins of cannabis gummies, one of which was opened, sitting on Barbara's desk earlier in the day.



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Case Study #3 – More Facts

Barbara's desk and computer are located in a single-occupant office. The desk has drawers, none of which are lockable. There is a filing cabinet that Barbara keeps locked but you have a key because you occasionally have to access the payroll information inside. If what Kenny says is true, you believe Barbara may be in violation of the district's computer use and alcohol/drug policies.



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Case Study #3 - Questions

Barbara is out to lunch. The door to her office is closed.

Can you enter Barbara's office to search for the offending materials?

Can you open the desk?

Can you open the locked filing cabinet?



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Case Study #3

You don't find anything in the desk or filing cabinet, but you notice Barbara's backpack under her desk. It is easily large enough to hold containers of gummies. The backpack is not district property. It is zipped up but not otherwise locked.

Can you open the backpack?

Can you access Barbara's computer to see if she has been looking at inappropriate sites?



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Case Study #3 – More Facts

Raul also reported receiving several sexually explicit text messages his personal cell phone that Cindy sent from her own personal phone. Unfortunately, Raul deleted the messages. While in Cindy's office, you see her smart phone sitting in plain view.

Can you look through Cindy's phone to see if she sent Raul the offending messages?



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How to Investigate Step 4: Identify Potential Witnesses

- Complainants
- Accused
- Bystanders
- Anyone else with knowledge of the circumstances



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Case Study #4 – Facts

Rory, a student employee in the student store, reports that he has been in a relationship with IT Supervisor, Jacqueline. According to Rory, Jacqueline threatened him by stating that if he ends the relationship or tells H.R., she would post several compromising pictures of him on the District website's student portal.



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Case Study #4

Rory says Jacqueline made this threat in the student store. He reported that two other student workers, Joey and Jordan, were nearby when Jacqueline made this threat.



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Case Study #4

Are there any initial steps you should take if the district conducts an investigation?

What do you investigate?

Who should you interview?

What if Rory says that he just wanted to let you know what's going on, but he does not want an investigation.

What then?



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How to Investigate Step 5: Establish Order of Witnesses

General principles:

- Get complete version from complainant first
- Give accused the last word
- Be flexible



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How to Investigate Step 6: Conducting the Interviews

Recording the interview

- Tape record vs. notes
 - Pros:
 - More accurate
 - Focus on listening
 - Cons:
 - “Chilling effect” on witness
- Signed statements



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How to Investigate Step 6: Conducting Interviews

Starting the interview

- Introduction and admonitions
- Employee’s right of representation
- Confidentiality
- No retaliation



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How to Investigate Step 6: Conducting Interviews

General tips for conducting interviews

- Stick to facts – Who, what, when, where, why
- Ask open-ended questions
- Try not to lead the witness
- Don't forget – the wrap up questions
 - "Have you told me everything?"
 - "Is there anything else you wish to add?"
 - "Is there a question you were expecting which I haven't asked?"



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How to Investigate Step 6: Conducting Interviews

Interviewing the accused employee

- Reasonable notice
- Right to representation
- During normal working hours
- Only for reasonable period of time



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Case Study #5

You are investigating a claim of age discrimination and harassment against a manager. (The manager is not a member of a bargaining group.)

Before you begin your interview, the manager refuses to say anything unless she has an attorney present and threatens to leave the interview.

How should you respond?



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Case Study #5 - Continued

The manager has obtained an attorney. During the interview, you ask the manager a question but before he can answer, his attorney stands up, objects, points her finger at you, and says that you are not entitled to ask this question and she is directing her client not to answer.

How should you proceed? What is your best response?



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Case Study #5

As you continue the interview, you move to a new topic which causes the attorney to say that the manager should not answer the questions on the topic because his answers could incriminate him. You agree with her attorney's assessment.

How should you proceed? What is your best response?



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How to Investigate Step 6: Conducting Interviews

Legal rights of the accused employee

- Representation (Weingarten)
- The right against self-incrimination
 - *Lybarger v. City of Los Angeles*



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How to Investigate Step 7: Assessing Credibility

- Bias
- Motive
- Evasiveness/vague answers
- Defensiveness
- Recollection of details
- No eye contact
- “I don’t recall”



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How to Investigate Step 8: Evaluating the Evidence

What is evidence

- Documents
 - E-mails, memos, timesheets, documents
- Eyewitness testimony
 - Personal knowledge
- Physical evidence
 - Broken machinery, dented vehicle, etc.



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How to Investigate Step 8: Evaluating the Evidence

What is NOT evidence:

- Rumors, gossip
- General statements that cannot be supported
- Opinions



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How to Investigate Step 8: Evaluating the Evidence

For each allegation determine:

- Fact finding – did the employee commit the alleged act?
- Rule/policy violation – did employee's conduct violate any rule, regulation or law?



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How to Investigate Step 8: Evaluating the Evidence

The burden of proof

- Preponderance of the evidence
- It is more likely than not that the alleged misconduct occurred



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How to Investigate Step 8: Evaluating the Evidence

Evaluating the facts in a harassment investigation

- Review district policy
- Include relevant factual findings for type of harassment
 - Quid pro quo - “this for that”
 - Hostile work environment



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How to Investigate Step 8: Evaluating the Evidence

Evaluating the facts in a discipline investigation

- Review district policy/work rule
- Include relevant factual findings
 - Include negative effect on workplace, if any
 - Include negative effect on educational environment, if any



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How to Investigate Step 8: Evaluating the Evidence

Hostile work environment?

- Visual, physical, or verbal conduct
- Based on complainant's protected status
- Subjectively offended
- Impact work ability



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How to Investigate Step 8: Evaluating the Evidence

Quid pro quo harassment?

- Unwelcome sexual conduct/request for sexual favor
- Close connection with discussion of job benefits
- Intent of accused
- Objective element



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Case Study #6

You are investigating charges of veteran status harassment by a non-veteran faculty member, Clarence, against a military veteran faculty member, Alec. You received a complaint that Clarence frequently tells Alec, “Hey Rambo, let me know before you come shoot up the campus so I can call in sick!”



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Case Study #6

During your interview of Alec, he informs you that another faculty member Louise, has been present for the comments. You interview Louise, but she has no recollection of the comments.

How should you proceed in completing the investigation? What factors should you consider when evaluating the claims?



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Case Study #6

Clarence vehemently denies the comments. In fact, he says immediately before Alec complained, Clarence was about to lodge a harassment complaint against Alec for repeatedly trying to convert him to Christianity, even though Clarence is Muslim.



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Case Study #6

Clarence also reported that Alec frequently quotes Bible verses to him in front of other co-workers, including Louise. Clarence also says that Alec has sent numerous anti-Muslim Facebook messages to both him and his wife. Clarence offers to allow you to speak to his wife and to see the Facebook messages.

Now how should you proceed?



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How to Investigate Step 9: Writing the Report

- Introduction
- Method used
- Summary of investigation
- Allegations
- Chronology
- Findings



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How to Investigate Step 9: Writing the Report (Con'd)

- Attachments
- Recommended disciplinary action (if part of your assignment)



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What to Report



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What to Report

Communicating findings to complainant

- Follow agency rules/CBA
- Follow Title 5, if applicable
- General finding
- Appropriate action taken
- Appeal rights, if any
- Confidentiality
- No retaliation



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What to Report

Communicating with the accused

- Specific findings (if sustained)
- Recommended actions
- Appeal
- Confidentiality
- No retaliation
- If discipline, *Skelly* notice, investigative report, supporting data



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What to Report

Communicating with others

- Privacy rights
- General vs. specific
- Sending a message
- Morale
- Title 5 requirements



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Title 5 Requirements Community College Districts

- Applies ONLY to harassment and discrimination complaints
- Based on actual or perceived:
 - Sex or gender
 - National origin
 - Religion
 - Age
 - Physical or mental disability
 - Race
 - Color
 - Sexual orientation
 - Ancestry/ethnicity
 - Association with person/group



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Title 5 Requirements Community College Districts

- Upon receipt:
 - Forward copy of complaint to state chancellor
 - Provide notice to complainant of impartial fact-finding
 - Calendar timelines



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Overview of Keys to a Successful Investigation

- Promptly investigate
- Choose the right investigator
- Prepare and plan
- Adhere to rules
- Confidential, impartial, thorough



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Disciplinary and Harassment Investigations: Who, What, When and How

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Presented By: Alison R. Kalinski

Thank You!

Alison R. Kalinski

Senior Counsel | Los Angeles

310.981.2099 | akalinski@lcwlegal.com

www.lcwlegal.com/people/alison-kalinski/



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